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No. 79–907

IN THE

Supreme Court of the United States

October Term, 1979

LAWRENCE B. INGRAM, Secretary,
Department of Human Services of
New Mexico,

Petitioner,

v.

JACQUELINE NOLAN, *et al,*

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONER'S MEMORANDUM IN RESPONSE TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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Petitioner files this memorandum in response to the brief filed by the Solicitor General for the United States as Amicus Curiae.

STATEMENT

In its Statement, the United States acknowledges that the Department of Health, Education, and Welfare ("HEW") had approved New Mexico's community property regulation at issue in this case, but that such approval "apparently did not contemplate a situation, such as is presented here. . ." (Amicus Brief, n. 1, at 1). This representation to the Court as to the nature and scope of the HEW approval depends on facts outside the record in this case and HEW should not be permitted to

introduce them in an Amicus Brief having chosen not to participate in the trial of these issues below.

The Petitioner also takes issue with HEW's attempt to minimize the importance of its approval of the community property regulation when it approved New Mexico's state plan on June 4, 1976. The United States argues that such approval does not "conclusively determine the validity of a State Plan under the AFDC program," citing the case of *King v. Smith,* 392 U.S. 309. (Amicus Brief, n. 1 at 1). However, the holding in *King v. Smith, supra,* was that agency approval of a state regulation which was judicially found to be in violation of a federal *statute* was not controlling. In the case at bar, the argument is whether a state regulation is contrary to another federal *regulation.* This involves an area in which federal agency action is to be given considerable weight. For HEW to now disavow that approval without offering any legal basis for its change in position is to put forth an argument which falls of its own weight.

DISCUSSION

I. HEW'S DISAVOWAL OF PETITIONER'S REGULATION IS FOUNDED ON A BASIC MISUNDERSTANDING OF COMMUNITY PROPERTY PRINCIPLES

The HEW brief demonstrates a nearly total lack of understanding of community property principles, and as a consequence its conclusions which depend on viewing those rights as "inchoate" are unsupportable in law. Under New Mexico community property law, income earned by respondent's spouse from wages or any other non-separate property source is community income,[1] to which each spouse has a legal one-half interest.[2] The theory behind such a division is that although the husband may

1 See § 40-3-12.A. N.M.S.A. 1978, set forth at Pet. 18a.

2 See *McDonald v. Senn,* 53 N.M. 198, 206, 204 P.2d 990 (1949).

perform the work which generates the wage income, the wife performs household duties which permit him to leave the house and earn the income. As such the wage income is not "his" income except to the extent of his one-half interest created by operation of law.[3]

The interest created in each spouse is incorrectly described by HEW as "inchoate legal causes of action." (Amicus Brief, p. 8.) This suggests that a wife in the circumstances described above can make her husband's wages available to her only by bringing an action in court, like a child support action. Although that option might be available to a spouse in unusual circumstances, the common way in which a spouse makes use of community income is through use of checking accounts, credit cards, and direct sharing of income. With the advent of the federal Equal Credit Opportunity Act,[4] and implementing Regulation B, 12 C.F.R. § 202.7(d) (3),[5] when an unemployed wife in an equal management community property state, such as New Mexico, applies for unsecured credit, the creditor cannot request her husband's signature on a note or loan application if the community itself is credit worthy. As one commentator has described it,

> "Thus, for the first time, wives in equal management community property states have been put on a truly equal footing with their husbands. Through the creation of debts which bind the community property, wives may manage community property independently of their husbands' consent or cooperation."[6]

3 See *Hughes v. Hughes,* 91 N.M. 339, 343, 573 P.2d 1194, 1198 (1978). In accord, see *Poe v. Seaborn,* 282 U.S. 101, 113 (1930).

4 Equal Credit Opportunity Act, as amended, 88 Stat. 1521 (1974), 15 U.S.C. §§ 1691-1691f.

5 Regulation B, 12 C.F.R. § 202.7(d) (3) [1977].

6 "Equal Management of Community Property and Equal Credit Opportunity", Anne K. Bingaman, 13 Idaho Law Review 161, 164 (1977).

Thus, Mrs. Nolan's interest in the community income is available to her and is not an "inchoate" right as a practical matter. Furthermore, at law her interest is not inchoate but present, vested, and equal to her husband's interest.[7] Her interest as a wife in New Mexico is more than a "mere expectancy."[8]

2. THE ADMINISTRATIVE HISTORY SUPPORTS PETITIONER'S CONSTRUCTION OF ITS COMMUNITY INCOME REGULATION NOTWITHSTANDING THE UNITED STATES' MISQUOTATION OF THAT HISTORY

In HEW's attempt to derive support for their position from the administrative history of 45 C.F.R. § 233.20(a) (3) (ii) (D), they misquote and misconstrue the language of that history. HEW proposed a regulation which had as its express purpose the clarification of the definition of income to include a "legal interest in community property or a trust, even though he does not secure them."[9] Later HEW modified the language of that regulation by adding the word "liquidated," and eliminating the phrase "but does not do so."[10] In effect, HEW was modifying the regulation so as to exclude causes of action which might not result in actual income. In explanation of those changes, HEW indicated that they did not intend to include income which is in the form of an "unliquidated legal cause of action," giving the example of a child support order which had not been paid. Nowhere in the explanation is there any suggestion that interests in community property or trusts were to be treated any differently under the revised language than under the original language.

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7 Note 3, *supra.*
8 Ibid.
9 Amicus Brief, pp. 8-9; See 38 Fed. Reg. 18254 (1973).
10 See 40 Fed. Reg. 30963-30965 (1975).

Specifically, the United States' Amicus Brief misquotes that administrative history in the following paragraph:

> Thus, based on the notice-and-comment procedure, and expressly to conform to the decisions of this Court (*ibid.*), the regulation as finally adopted was designed generally to exclude from available income "resources which exist only in the form of unliquidated legal causes of action," and particularly "income *** available *** through a[n inchoate] legal interest in community property." [Amicus Brief, p. 9].

The citation "*ibid.*" following the word "Court" suggests that the preceding phrase is a quotation, which it is not. The first phrase in quotation marks, "resources which exist . . . action," although not cited, is found at Section 6 of 40 Fed. Reg. 30963, 30964 (1975). The full text of Section 6 is as follows:

> 6. Changes in the definitions of "currently available" income and resources are contrary to federal court decisions affirmed by the U.S. Supreme Court and are unnecessarily punitive and open to subjective interpretation.
>
> Response: The comments raised a valid criticism with respect to the interpretation of the phrase "currently available". The language of the regulation was clarified so that the reference regarding consideration of a legal interest in income or resources is a reference to a liquidated sum and not to an uncollected judgment such as a child support order which has not been paid. The regulations were revised to recognize the distinction which exists between that which is actually available and those resources which exist only in the form of unliquidated legal causes of action.

A reading of Section 6 reveals that the language placed in quotation marks by the United States in its brief, viz. "income . . . available . . . through a[n inchoate] legal interest in

community property," is not found in this section of the administrative history *at all.* For the United States to connect this quoted language with the word "particularly" and to fail to include citations which would distinguish the two phrases, is to engage in highly improper argument.

This is an attempt by the United States to turn around the administrative history, which on its face is supportive of the petitioner's argument that "income" includes community property interests, so as to make it appear that the United States, in fact, attempted to exclude community property interests from its definition of income. Because this argument is the focal point of the Amicus Brief, the Petitioner submits that the Court should reject the Amicus argument in its entirety. Given the deference that this Court generally gives to opinions of agencies with regard to the meaning of their own regulations, it is imperative that an argument which is premised on such substantial error not be accepted by this Court.

CONCLUSION

The state of New Mexico reiterates its request that this Court accept its petition for certiorari, or at least postpone consideration of it until all appeals are taken from the case of *Harper v. New Mexico Department of Human Services,*[11] now pending in the New Mexico Supreme Court.

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11 *Harper v. New Mexico Department of Human Services, Income Support Division,* Court of Appeals for New Mexico, No. 4392, certified March 15, 1980 to Supreme Court of New Mexico, No. 12,972. Oral arguments before the New Mexico Supreme Court were held May 7, 1980.

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